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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
SBC PETITION FOR RELIEF FROM	)	File Nos.
REGULATION PURSUANT TO SECTION	)	
706 OF THE TELECOMMUNICATIONS	)	CC Docket No. 98-91
ACT AND 47 U.S.C. §160 FOR	)	
ADSL INFRASTRUCTURE AND	)	DA 98-1111
SERVICE	)	
	)	

OPPOSITION OF THE COALITION REPRESENTING INTERNET SERVICE PROVIDERS

COALITION REPRESENTING
INTERNET SERVICE PROVIDERS

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June 23, 1998

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OPPOSITION OF THE COALITION REPRESENTING INTERNET SERVICE PROVIDER

The Coalition Representing Internet Service Providers (CRISP) opposes the "Petition For Relief" by the above-captioned SBC Corporation telephone companies, Southwest Bell Telephone Company, Pacific Bell and Nevada Bell (collectively SBC) which seeks to vitiate prevailing unbundling and related obligations for ADSL service. SBC encourages the Federal Communication Commission to exempt Incumbent Local Exchange Carriers (ILECs) from offering unbundled network elements by effectively reforming Section 706 of the Telecommunications Act, even though Congress refrained from clearly articulating or affirmatively expressing the requested exemption.

The Coalition Representing Internet Service Providers, an unincorprated association

serving the interests of small and medium size internet, information service providers, and potential competitive local exchange carriers, has its main office at 95 Mariner Green Dr., Corte Madera, CA, and its legal counsel may be contacted at this address or the telephone number set forth elsewhere in this filing.

Under the terms of section 251, ILECs must make interconnection, unbundled network elements, and wholesale services available only to "requesting telecommunications carriers" at reasonable rates. In the Local Competition Order, which implemented section 251, the Commission concluded that an ordering party fell within this definition only to the extent that it provided telecommunications services directly to the public. Thus, companies that provide both information and telecommunications services are able to request interconnection, unbundled network elements (UNEs), and resale under section 251, but companies that only provide information services are not.[1] Because SBC's petition implicates rules under section 251 and 252 as well as 706, the Commission must review whether the petition is within its jurisdiction.[2]

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[1] 47 U .S.C. §251; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at 149, ¶ 292 (released August 8, 1996) (Local Competition Order), affirmed in part and vacated in part, Iowa Utilities Board et. al v. FCC, No. 96-3321 and consolidated cases (8th Cir., Oct. 15, 1996) at 493-95, ¶¶992-95, and Opinion on Petition for Review of the FCC's Local Competition Order (8th Cir., July 18, 1997) (J. Hansen)(upholding the Commission's unbundling rules that do not subvert the Act's purposes, except as set out at footnote 38 of the decision)(Iowa Opinion).

[2] 47 U .S.C. §401 at 10(1)(d) limiting forbearance relief effecting Section 251(c), even if SBC's petition fell within the category of "forbearance" which it does not. Moreover, the Iowa Opinion, cites Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986), the Supreme Court explained that section 2(b) of the Telecommunications Act of 1934 "fences off" intrastate matters from FCC regulation. The Louisiana decision indicates that in order to qualify for the

Many ISPs and small businesses lack the human, technical and financial resources to undertake interconnections with all other carriers, as required under the duty set out in Section 251(a).[3] As a result, their choices in advance telecommunications capabilities are derivative of, and thereby limited to, others who qualify as carriers and are in a position to secure these broadband services.

I. INTRODUCTION

Section 706 of the Telecommunications Act of 1996 (the Act) directs the Commission to foster the deployment of "advanced telecommunications capability." It goes on to define advanced telecommunications capability as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice,

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"unambiguous" exception to section 2(b), a statute must both unambiguously apply to intrastate telecommunication matters and unambiguously direct the FCC to implement its provisions. Even a traditional analysis of the interstate/intrastate quality of the local competition provisions of the Act reveals that these functions (i.e., interconnection, unbundled access, resale, and transport and termination of traffic), unlike IXC exchange access, are fundamentally intrastate in character. The Eighth Circuit court elaborated that "[a]llowing competing telecommunications carriers to have direct access to an incumbent local exchange carrier's established network in order to enable the new carrier to provide competing general local telephone services is an intrastate activity even though the local network thus invaded is sometimes used to originate or complete interstate calls." If correct, this Commission will lack the requisite jurisdiction to definitively rule on the instant petition's request concerning wholesale discounts and MFN obligations, unless Commission authority was delegated under other applicable statutory provisions.

[3] If the Commissions's ruling in the Local Competition Order unduly encroached upon state regulatory discretion as indicated by the Iowa Opinion, it may be necessary for each state to revisit separately precisely whether data service providers may qualify to receive intrastate access to UNEs without interconnecting to other carriers upon demand.

data, graphics, and video telecommunications using any technology."[4] If the Commission determines that such advanced capability is not being deployed in a reasonable and timely manner, the Commission is directed to take "immediate action" to remove barriers to such deployment.[5]

On June 9, 1998, SBC filed a petition pursuant to section 706 of the Telecommunications Act seeking relief from: (1) any unbundling obligation applicable to ADSL facilities; any obligation to provide a wholesale discount on ADSL services; (2) dominant treatment of ADSL service; and (3) any MFN obligation as applicable to inconsistent agreements under section 706 and section 10 for asymmetrical digital subscriber line (ADSL) facilities and services. Despite its efforts, SBC is simply incapable of excluding ADSL from Congress's broad definition of "advanced telecommunication capability" and the scope of Section 706.

II. BACKGROUND

A. The Internet Service Providers And Competitive Broadband Data Services

There exists a wide class of internet service providers (ISPs), information vendors, and

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[4] Section 706 also requires the Commission to initiate a proceeding concerning the availability of advanced telecommunications capabilities to all Americans. It further directs the Commission to do so no later than 30 months after the '96 Act was signed into law. Section 706 also requires the Commission to complete the inquiry within 180 days.

[5] 47 U.S.C. §706(b).

innovative small businesses, educators, health care specialists, audio/video artists, engineers, and programmers whose livelihoods depend upon the timely and optimal deployment of cost-based xDSL services. The workers of the enterprises number in the millions and permeate each of the sectors of the telecommunications industry. A considerable number of these ISPs and small businesses with growing broadband data service needs are potential entrants into the competitive local exchange service market. This is particularly true of those that add-value to local exchange interconnection via internet service, narrowcasting, on-line editing, anonymous messaging, or sector-specific information delivery.

Significant technological advances in recent years are dramatically changing the global marketplace. With approximately 62 million people in the United States having access to the Internet, it is becoming an increasingly popular medium for advertising goods and services and for conducting commercial transactions.[6] Any business with a server that processes information over the Internet has come to appreciate the benefits of advanced broadband technology.

Congress recognized the valuable potential of broadband data capabilities by establishing, under Section 714 of the Act, the Telecommunication Development Fund to promote the development and deployment of telecommunication services, particularly by small business.[7] It is estimated that businesses spent $906.5 million for advertising on the Internet in

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[6] IntelliQuest Information Group, Inc. (Feb. 5, 1998) <http://www.intelliquest.com> (number of users as of the fourth quarter, 1997).

[7] 47 U.S.C. §714.

1997.[8] Advertisements on the World Wide Web (``Web''), the graphical segment of the Internet, often contain ``pages'' which may contain text, pictures, video, sound, interactive graphics, or a combination of all of these features.

Consumers are able to purchase goods or services directly over the Internet. Businesses also use CD-ROMs to disseminate information about their products to consumers. In addition, businesses use e-mail and facsimiles to communicate directly with consumers. Estimates of online sales vary dramatically. One survey, however, estimates that as of the fourth quarter, 1997, 37.2 million users were shopping online and 10.5 million users were purchasing online.[9] Yet, tens of thousands of nascent businesses, with limited resources, remain unable to capitalize on the new technology or launch their innovative services that are contingent upon cost-based access to ADSL.

B. Regulatory Evolution

As noted in recent case law, the antecedents behind the Telecommunications Act of 1996 have been described often, but the evolution of regulations governing computer-mediated telecommunications and the advent of broadband data facilities that connect to the public switched telecommunication network generally has been overshadowed. While one need only look to the ILECs's notoriously slow roll-out of ISDN services to appreciate that superior

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[8] Internet Advertising Bureau (Apr. 6, 1998) <http://www.iab.net/news/breaksource.html>.

[9] IntelliQuest Information Group, Inc. (Feb. 5, 1998) <http://www.intelliquest.com>.

technology is often suppressed, the digital modems required for high-speed ASDL service have only become affordable for residential users in recent years. The development in regulation over data facilities and services outlined below provides vital lessons of experience reinforcing the rationale behind the policies codified in sections 251, 252, and 706 of the Act.

Back in the 1960s, when the Internet was largely a media of the Department of Defense, the FCC realized that communications over telephone lines increasingly involved computers. In order to determine what to do with computerized communications, the FCC initiated the first of the Computer I, Computer II, and Computer III proceedings trilogy. In 1971, the FCC released Computer I.[10] In this order, the FCC attempted to separately identify computers which were involved in the means of communication and to distinguish them as a category apart from computers which performed data processing services. It defined data processing as the "use of a computer for the processing of information as distinguished from circuit or message-switching."[11]

The upshot of this rough cut was that computers involved in the means of communications would be regulated under title II of the Communications Act of 1934 (which regulates common carriers). Computers providing data processing services over the telephone network would not be regulated under title II. Any form of communication which fell between

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[10] See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication. Servs. and Facils, Order, 28 FCC 2d 267 (1971), aff'd in part sub nom. GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir.).

[11] Computer and Communications Industry Association v. FCC, 693 F.2d 198, 203 n. 6 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983)[hereinafter "CCIA"] (citing Computer I Tentative Decision, 28 FCC 2d at 295).

the two clearly defined categories, well, the FCC would just have to work it out on a case-by-case basis.[12]

Even though data processing services were not regulated under title II, the FCC found that it had jurisdiction over these services under the ancillary jurisdiction of title I. The CCIA provided grist for those who argued that the FCC has a form of jurisdiction over the Internet, albeit limited jurisdiction. As stated in People of the State of California v. FCC, Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. In the case of enhance [telephone] services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority over common carrier services.[13] The FCC has only concluded that it has jurisdiction over data processing services where they are transmitted over the telephone networks.[14]

The rationale behind Computer I had more to do with the economic power of telephone companies than it did with computers. As the relationship between computers and telephone communications grew, so did the threat that the large telephone companies would use their economic might to subsidize data processing services and crush what the FCC found

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[12] See CCIA, 693 F.2d at 203.

[13] California v. FCC, 905 F.2d 1217, 1240 n. 35 (9th Cir. 1990) (citations omitted).

[14] See CCIA, 693 F.2d at 213 ("In Computer II the Commission found that the exercise of ancillary jurisdiction over both enhanced services and CPE was necessary to assure wire communications services at reasonable rates. Regulation of enhanced services was deemed necessary to prevent AT&T from burdening its basic transmission service customers with part of the cost of providing competitive enhanced services").

to be a thriving and competitive market. Therefore, the FCC ruled that large telephone companies could offer data processing services only through a separate subsidiary, preventing cross subsidization. This, the FCC believed, would promote competition, more efficient services and innovation.

It was not long before Computer I proved itself inadequate. The FCC faced a potential of endless case-by-case determinations, deciding which hybrids of computerized communications fell under title II and which did not. Therefore, the FCC initiated the Computer II proceeding.

Computer II, released in 1980, largely affirmed and built on the foundation of Computer I.[15] Computer II, however, redrew the distinctions between communications and data processing services by introducing the concepts of basic service and enhanced service. Basic service, which is regulated under title II, is the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."[16] Enhanced services, on the other hand, are

> "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

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[15] See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 (1980), Memorandum Opinion & Order, 84 FCC 2d 50, further reconsideration, 88 FCC 2d 512 (1981) aff'd, CCIA, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1982), cert denied, 461 U.S. 938 (1983).

[16] CCIA, 693 F.2d at 205 n. 18.

Enhanced services are not regulated under Title II of the Act.[17] Enhanced services include data processing services under Computer I and hybrid forms of communications. [18]

In the Computer II proceeding, the FCC continued to be concerned with the protection of a thriving and competitive market from the economic dominance of large telephone companies and monopolies. The Computer II proceeding implemented what was known as "structural safeguards" which maintained the policy that large telephone companies could provide enhanced services only through separate subsidiaries.[19] In addition, the broad scope of the ESP status permitted the Commission to avoid case-by-case analysis. "A policy of identifying regulable enhanced services would, in the Commission's view, be a reversion to the futile Computer I case-by-case approach that inhibited technological innovation and diverted Commission resources from more beneficial activities."[20]

In 1982 a consent decree was entered in settlement of the government's 1974 antitrust suit against AT&T. That decree, as modified by the district court, became known as the "Modification of Final Judgment," or "MFJ." [21] The MFJ required AT&T to divest itself of its

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[17] 47 C.F.R. Sec. 64.702(a).

[18] CCIA, 693 F.2d at 205 n. 18 ("Enhanced service is any service other than basic service").

[19] CCIA, 693 F.2d at 207-209.

[20] CCIA, 693 F.2d at 209-210.

[21] See United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983)(MFJ).

local exchange monopolies. Under the reorganization plan approved by the district court, the twenty BOCs eventually later named in the 1996 Act were spun off from AT&T and grouped into seven regional Bell operating companies, or "RBOCs" (now four thanks to mergers), of which BellSouth is one.

In 1983, the Commission determined that Enhanced Service Providers (ESPs) would be exempt from the access charge requirements of long distance carriers (interexchange services), even if an ESP may be using the local telephone service to originate and terminate interstate communications.[22] ESPs would be classified as "end users" and would generally pay "local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. Enhanced Service Providers also pay special access surcharges for private lines under the conditions set out in our rules." [23]

Once again, the rational for the Commission's actions was based on maintaining a competitive ESP market. According to the Commission,

> At the time we adopted the original access charge plan, however, we concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations and cause disruptions in providing service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users,

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[22] MTS and WATS Market Structure, Order, 97 FCC 2d 682 (1983) (referring to origination and termination of interstate communications by ESPs as "leaky PBX" scenario) [hereinafter "MTS and WATS Market Structure"].

[23] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 para. 2 n. 8 (1988) [hereinafter "Amendments of Part 69"]. See also MTS and WATS Market Structure at para. 4; 47 CFR Sec. 69.2(m) (1996) ("'End User' means any customer of an interstate or foreign telecommunications service that is not a carrier...").

> including enhanced service providers. . . . We reiterated our view that rate shock, which provided the original basis for the special treatment of enhanced service providers, justified a temporary but not a permanent exemption . . . Amendments of Part 69 at para. 2.

The ESP industry was in a unique period of change. Telephone companies were filing plans with the Commission which permitted them to enter the ESP market. BOCs for the first time were permitted to offer enhanced services. By this time, computerized information networks were coming online and capturing public attention. See, Id. at paras. 1, 13. Thus, the Commission concluded that this volatile and competitive market justified the ESP exemption from access charges.

After divestiture of the Bell Operating Companies (BOCs) from AT&T, the Commission reaffirmed its structural separation requirement.[24] Shortly thereafter, the Commission attempted to abandon the structural separation requirement in favor of lesser non-structural "safeguards," in its Computer III orders.[25] The Commission contemplated that the BOCs would be permitted to integrate their basic and enhanced services within a single

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[24] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, Report and Order, 95 FCC 1117, 1120, ¶ 3 (1984) (BOC Separation Order), affirmed on recon., FCC 84-252, 49 Fed. Reg 26056 (1984) (BOC Separation Reconsideration Order), affirmed sub nom., North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).§

[25] Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986), on reconsideration, 2 FCCR 3035 (1987)(Third Computer Inquiry Phase I Order), Phase II Order, 2 FCCR 3072, on further reconsideration Phase I Order , 3 FCCR 1135 (1988)(Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989)(Phase I Second Further Reconsideration Order), Phase I Order and Phase I Reconsideration Order vacated sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990), cert. denied 115 S.Ct. 1427 (1995) (further revising separation requirements for telephone companies).

corporate entity, once these safeguards were implemented.

In 1990, the Ninth Circuit Court of Appeals found that the FCC's decision to relieve the BOCs of structural separations requirements was "arbitrary and capricious" and violated federal law.[26] The court notably refrained from criticizing the Commission's policy goal of achieving competition in the provision of enhanced services unconstrained by regulation, but it invited the Commission to clarify on remand whether state regulation of enhanced services would necessarily thwart or impede the Commission's stated policy goals.

It is also well to recall that when the MFJ initially prohibited the BOCs from providing "information services," it defined them so as to include electronic publishing. The prohibition rested on two concerns commonly voiced about regulated monopolists operating in fields adjacent to their monopolies. First, to the extent that the monopolist's good or service is an input for the adjacent industry, the monopolist may offer its own enterprise discriminatory advantages, in this case "favorable access to the local network."[27] Second, the monopolist may use monopoly revenues to subsidize its associated enterprise.[28]

In the context of regulated industries, the tendency has been for the monopoly to leverage excess profits from services for groups of end-users with the fewest choices among service providers, to subsidize services to other end-users groups in less regulated sectors

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[26] California v. FCC, 905 F.2d 1217, 1239 (9th Cir. 1990).

[27] MFJ, 552 F. Supp. at 189.

[28] Id.

when the later group have greater choices. In a "triennial review" process established by the decree, the Department of Justice moved to lift the information services restrictions, and no party to the decree opposed the motion. The district court ultimately did lift them.[29]

In the interceding years, there was little basis for any of the LECs to contest that ESP status is the status of ISPs which connect to users over a telephone network.[30] As technology became faster, the information service providers, ESP, and ISPs became increasingly potent at offering data messaging, signalling, and text-based services.

The 1996 Act rescinded the MFJ[31] and changed the entire telecommunications landscape, while still imposing certain structural separations and interconnection requirements on the RBOCs. Several key provisions of the Act apply to incumbent local exchange carriers generally, such as 47 U.S.C. Sec. 251, requiring ILECs to offer nondiscriminatory access and interconnection to local competitors.

Sections 271 through 276 of the Act, however, entitled "Special Provisions Concerning Bell Operating Companies," are applicable to the BOCs and their affiliates alone. For instance, Section 271 establishes requirements that must be met before the BOCs can break into the long

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[29] United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991), aff'd, 993 F.2d 1572 (D.C. Cir. 1993).

[30] See also Access Charge Reform Notice paras. 284 & 377 (stating that information services as referred to in the Telecommunications Act of 1996 are ESPs).

[31] See Pub. L. No. 104-104, Sec. 601, 110 Stat. 143 (1996).

distance, or "interLATA," market [32]; Section 273 bars the BOCs from manufacturing and selling telecommunications equipment until they have received authorization to enter the interLATA market; and Section 275 prohibits BOCs (other than Ameritech) from providing alarm monitoring services for five years.[33] In general these provisions simply maintained, and in most cases loosened, various restrictions to which the BOCs were already subject under the MFJ. By contrast, the provision at Section 274 reimposed on the BOCs some of the information services restrictions that had been lifted in 1991.

As Internet services were growing, the telephone network was fragmenting. One's long distance service was no longer the same as one's local telephone service. In order to address how these telephone services would relate to each other, the FCC initiated the access charge proceedings.[34] Included in the proceedings was consideration of how ESPs fit within this regulatory scheme.

The Commission has yet to find that it has jurisdiction over the Internet per se or over the Internet where it does not utilize the telephone network (where it is transmitted over cable, wireless, or computer networks).[35] The significance of the ESP status of ISPs is that: (1)

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[32] See SBC Communications, Inc. v. FCC, 1998 WL 121492 (D.C. Cir. Mar. 20, 1998)

[33] See generally, BellSouth Corp. v. FCC, 2998 WL 242244 (D.C. Cir. May 15, 1988)

[34] See 47 C.F.R. Sec. 69.2 (1997) ("Access charges" are fees collected by the local telephone companies for the origination or termination of any interstate or foreign telecommunication).

[35] See also Telecommunications Act of 1996, sec. 509 (stating policy of limited federal jurisdiction by stating "[i]t is the policy of the Federal Government . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer

ISPs/ESPs are typically not telecommunications common carriers; (2) ISPs/ESPs are not regulated under title II; (3) the FCC has jurisdiction over the ISPs/ESPs pursuant to the ancillary jurisdiction under title I; and (4) ISP/ESPs are "end users" of the telephone network and do not pay the access charges of long distance carriers. The present status, however, may be effected by public hearings conducted by the Commission. Under the 1996 Act, the Commission's jurisdiction to engage in regulatory reform under that Act is prescribed for biennial reviews.[36] Notwithstanding the limits of regulatory jurisdiction to govern ISP/ESPs in data-driven businesses in adjacent markets, ISP/ESPs have a clear and present interest in the Commission's exercise of jurisdiction over the ILECs, including proposed reforms effecting competition, and direct and indirect uses of essential local exchange networks.

C. Summary of CRISP's Position

Implied exemptions are generally disfavored under law. Under the Act, Congress demonstrated that it clearly understood how to carve out exemptions forcefully to rules governing the industry,[37] but it refrained from excluding ADSL from Section 706. Congress's

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services, unfettered by Federal or State regulation").

[36] Under 47 U.S.C. Sec. 402, the Commission (1) shall review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service. Under subpart (b), the Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

[37] 47 U.S.C. §§251(f).

expression of one exemption reinforces the need to reject another unspecified one merely alleged here by SBC. The Act contains no such articulation with respect to ADSL services. Moreover, excluding ADSL from Section 706 not only would dismantle the ILECs explicit duties to unbundle the network to permit lines to be conditioned with ADSL under Section 251, but would also frustrate Congress's clear mandate to promote the deployment of advanced service. SBC's implied exemption of ADSL therefore should be denied.

Small businesses and ISPs have reasonably anticipated that CLECs will provide xDSL services and have already changed their position at considerable expense in reliance upon their legitimate expectations of competitive choices and rates for ADSL services.[38] In preparing for the use of ADSL, many micro-enterprises have foregone investing in alternative businesses and services. Accordingly, none of SBC's requested prongs of proposed relief warrant Commission action. CRISP's opposition to SBC's petition is submitted to underscore that:

> (1) SBC has not sustained its burden of showing relief may be granted under law, because Section 706 is not susceptible to a construction that excludes ASDL or broadband data service from its scope,[39] and

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[38] Many ISPs and small businesses, have under promise of expedited deployment of ADSL and other broadband services incurred large developmental expenses that may be recovered only for a large customer base comprised of business and residential users who are provisioned with broadband data services. Because many of these services involve bundling broadband data applications with CLEC services, restraints on CLEC interconnection to UNEs would impede the introduction of the associated enhanced services altogether. The Eighth Circuit's Iowa Opinion, supra at note 1, confirmed that access to UNEs should be broadly construed when it stated: "We believe that the FCC's determination that the term "network element" includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference."

[39] See e.g., Mississippi Power & Light Co. v. Moore, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) ("[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion.").

(2) An exemption from Section 706 would be inimical to Congress's goals of competition, investment, and innovation, and impose secondary losses from the ubiquitous suppression of innovation.[40]

While it is dubious, as a threshold inquiry, whether the Commission is the proper venue for the requested relief, there is simply no basis in law or fact for the Commission to reform Congressional legislation that provides a clear statement of ILEC interconnection obligations to include broadband capabilities for the transmission of data services. The Act arose against a highly intricate and hotly contested set of Commission rulings produced through regulatory oversight. Multiple series of proceedings culminated in the FCC's Local Competition Order that expressly stated that incumbent LECs could not restrict the services that competitors could provide over unbundled network elements.[41]

III.. THE COMMISSION SHOULD REJECT SBC'S PETITION BECAUSE ADSL SERVICES ARE FLATLY WITHIN THE SCOPE OF SECTION 706

Advanced telecommunications capability is defined as "a high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[42] While

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[40] The Iowa Opinion reaffirmed that the court "... agree[d] with the Commission's belief that the procompetitive effects of unbundling under the Commission's rules could spur enough innovation to offset any potential reduction in innovation that the unbundling standard might cause. Consequently, we uphold the FCC's interpretation of the "necessary" standard.

[41] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at 149, ¶ 292 (released August 8, 1996) (Local Competition Order), petition for review pending sub nom. and partial stay granted, Iowa Utilities Board et. al v. FCC, supra at note1.

[42] 47 U.S.C. §706(c)(1).

the protean nature of transmission facilities has been noteworthy to lawmakers, and may account for the want of any serious attempt to provide an exhaustive list of broadband services intended to be covered under the Act, it is beyond any reasonable dispute that ADSL offerings provides the salient capability. Accordingly, the Commission may apply the clear statement rule of statutory construction to reject SBC's petition.

Moreover, there can be no question that if statutory construction were to be determined in view of extrinsic evidence, such as legislative history, statutory structure, or administrative rulings, the same outcome must result. Even if an ambiguity of connotation could be introduced, which it cannot, a glimpse at the statutory construction is compelling and sufficient to deny SBC's petition. Congress's mandate specifies that ILECs must take measures for eliminating obstacles to competition and barriers to entry, accommodating interconnection and resale, and accelerating the deployment of broadband facilities to ensure a multi-vendor market in each region for advanced technological capability.

SBC's attempt at this juncture to draw a distinction between the "broadband capabilities" referred to within the Act and ADSL, is an effort to draw a distinction without a difference. This is particularly true not only because ADSL was already a known technology developed to offer broadband capacity using copper wires over POTs, but because ADSL relies predominantly on the existing infrastructure. Nothing in the record proves that where additional equipment is required it might raise any serious problems of technical, economic or administrative feasibility. Quite to the contrary, SBC's sibling ILECs have demonstrated that feasibility of interconnection, provisioning, and OSS is not preclusive. SBC, stripped of its

usual recourse to feasibility arguments, comes now before the Commission to attain regulatory protection as if the relief requested somehow will advance Commission goals of reducing regulation. In fact, down the road it would result ultimately in the need for still greater government intervention either by the Commission, Congress, or the courts.

Where SBC's sibling BOCs are now providing ADSL, the service comes in several different variants. Some ASDL services provide ISPs and others up to 1.5 Megabits per second of bidirectional throughput over ordinary copper wires.[43] Subsection 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . " Moreover, Congress had notice before it promulgated Section 706, that to avoid switch congestion endemic to most conventional voice-grade circuits and multiplexing, xDSL modems could be directly connected to a packet network.[44] The heir apparent for broadband transport has long been xDSL services because, apart from formerly high fixed initial costs for modems, they promised to provide far greater capacity per dollar spent than antecedent technologies like ISDN. SBC can hardly claim to be surprised to learn that their duties to make available essential monopoly UNEs extend to CLECs deploying xDSL technologies.

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[43] ADSL bandwidth decreases as loop length increases, up to a maximum loop length of 18,000 feet. Other interference with ADSL transmission used to result from equipment like loading coils and bridge taps, which are deployed on many local loops. The main impediment to the deployment of xDSL services previously had been the high price of customer premise xDSL modems, which are now widely affordable.

[44] See K.Werbach, Digital Tornado: The Internet and Telecommunications Policy, FCC's OPP Working Paper Series, March 1997, citing Carol Wilson, "Will ADSL Technologies Prove to be ISDN Killers?" Inter@ctive Week, April 22, 1996 at 55.

IV. THE RELIEF IS INIMICAL TO CONGRESS'S CLEARLY ARTICULATED GOALS OF COMPETITION AND INVESTMENT

When the Senate delivered the Telecommunication Act, then known as S. 652, to the President for signature in 1996, the legislation was simply characterized as an Act to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Section 706 elaborated on the "Advanced Telecommunications Incentives" by providing that:

> (a) In general- The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. (emphasis added).

That is, Section 706 affirmatively sets out the goals of utilizing "measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment." It is plain that methods that remove barriers to infrastructure "investment" perforce would include as a subset those measures that promote the innovation using ADSL technologies by CLECs, ISPs and small businesses. Innovation attracts investment for infrastructure and adds value. It is antithetical to Congress's statutory language to suggest that Congress intended the Commission to embark on a course that would allow the ILECs to suppress broadband technology and stifle investment for innovation in the primary industry and those allied industries relying upon the competitive deployment of these

facilities.[45]

History has shown that a pattern of technology suppression is particularly likely to occur in an industry characterized by long-term market concentration.[46] Once a dominant position has been gained, the dominant firm maintains its power by practices designed to regulate competing technologies and sustain the incumbent's monopoly.[47] It is with these propensities in mind, that Congress passed the first comprehensive legislation overhauling the regulatory regime governing telecommunications in more than sixty years. That legislation

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[45] 47 U.S.C. SEC. 714, provides in relevant part: Telecommunications Development Fund.

`(a) Purpose of Section- It is the purpose of this section--

`(1) to promote access to capital for small businesses in order to enhance competition in the telecommunications industry;

`(2) to stimulate new technology development, and promote employment and training; ...

[46] For a summary of instances where new technologies in concentrated industries have been suppressed for anticompetitive purposes, see Adams & Brock, Walter Adams & James W. Brock, *Antitrust, Ideology and the Arabesques of Economic Theory*, 66 COLO. L. REV. 257, 263 - 64 (1995).

[47] This was the central claim, for example, in Telex Corp. v. IBM, 367 F.Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir. 1975), as well as several of the other IBM computer cases of the '60s and '70s such as In Re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir.) (1983). The trial court found in *Telex* that IBM manipulated design changes to defeat competitors' innovations in peripheral equipment and to maintain IBM's dominant position in peripherals that were "plug compatible" with IBM computers. That decision was reversed by the 10th Circuit, a reversal strongly criticized on empirical grounds in Note, *Innovation Competition: Beyond Telex v. IBM*, 28 STAN. L. REV. 285 (1976). In a petition for certiorari to the U.S. Supreme Court, a convincing argument was made that IBM's manipulation of peripheral connection standards, along with its exclusion of innovative peripheral equipment by pre-announcing its own products and improvements well before they were available, suppressed new technologies and ought to have been found a violation of the antitrust laws. However, the *Telex* case was settled and dismissed before action was taken on the petition.

enshrines Congress's predominant goals of (a) competition, (b) network unbundling, collocation, and resale, and (3) the deployment of advanced telecommunication capabilities to optimize investment and innovation.

A. Investment Goals Depend Upon Innovation Requiring ADSL

Unlawful monopolizers exploit the markets they come to dominate by deterring innovation. This is achieved by stifling the introduction of and investment in new technologies. Absent regulatory resistance, or any potential competition from CLECs in ASDL services, SBC will leverage its current monopoly power over local exchange service into high bandwidth facility markets. SBC may achieve this monopoly strategy by delaying, restricting, acquiring or otherwise suppressing new technologies. SBC seeks to delay the use of ADSL services because if ADSL were offered by CLECs, then it could displace existing technologies and, it turn, *allow CLECs to capture market share*. This litigious campaign to forestall entry by CLECs must be recognized for the dilatory tactic it is. It is a transparent offer to restrict new services and to continue imposing excessive prices on old inefficient services, rather than undertake any "honestly industrial" behavior by the industry's dominant firm.

As the Association of Local Telecommunications Services (ALTS)[48] points out,

[48]More recently, ALTS invoked Section 706 in a separate petition for declaratory judgment proposing what it called an "advanced communications network model to propel investment in local broadband networks." For example, they asked the Commission: (a) to revise our collocation rules to make it easier for CLECs to locate equipment in the incumbent telephone company's central office; (b) to require the ILECs to unbundle properly conditioned copper loops for DSL services offerings by CLECs; and (c) to require the ILECs to interconnect CLEC data